INTERIOR BOARD OF INDIAN APPEALS

Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, Bureau of Indian Affairs

24 IBIA 209 (09/23/1993)

Reconsideration denied:
25 IBIA 4

Related court case:
Seminole Nation of Oklahoma v. Norton, No. 00-2384 (CKK) (D.C.C. Sept. 27, 2001), 29 Indian L. Rptr 3287

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

SEMINOLE NATION OF OKLAHOMA
v.
ACTING DIRECTOR, OFFICE OF TRIBAL SERVICES, BUREAU OF INDIAN AFFAIRS

IBIA 92-216-A Decided September 23, 1993

Appeal from disapproval of an amendment to a tribal constitution.

Affirmed.

1. Statutory Construction: Implied Repeals-Statutory Construction: Indians--Indians: Tribal Organization: Oklahoma Tribes

   Absent convincing evidence, the Board cannot conclude that the requirement for approval of tribal legislation in sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137, was impliedly repealed by the Oklahoma Indian Welfare Act, 25 U.S.C. § 503 (1988).

2. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Indians: Tribal Organization: Oklahoma Tribes

   Proposals for constitutional amendments made by the tribal councils of the Five Tribes are not subject to the legislation approval requirement of sec. 28 of the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137.

3. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Indians: Tribal Organization: Oklahoma Tribes

   Under the Act of Oct. 22, 1970, 84 Stat. 1091, procedures for the selection of the principal chiefs of the Cherokee, Choctaw, Muscogee (Creek) and Seminole Nations and the governor of the Chickasaw Nation are subject to approval by the Secretary of the Interior.

4. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions

   Where a tribal constitution gives a Bureau of Indian Affairs official authority to approve or disapprove amendments, and no limitations are placed on that authority by the constitution or by Federal statute,

> the Bureau official has the discretion to disapprove an amendment which would remove the requirement for approval of future amendments.

APPEARANCES: L. Susan Work, Esq., Seminole, Oklahoma, for appellant; Scott Keep, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee; James G. Wilcoxen, Esq., Muskogee, Oklahoma, for amicus curiae Cherokee Nation of Oklahoma.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Seminole Nation of Oklahoma (Nation) 1/ seeks review of a July 17, 1992, decision of the Acting Director, Office of Tribal Services, Bureau of Indian Affairs (Director; BIA), disapproving an amendment to the Nation's constitution. For the reasons discussed below, the Board affirms the Director's decision.

Background

The Nation's present constitution was adopted on March 8, 1969, and approved by the Commissioner of Indian Affairs on April 15, 1969. 2/ Several amendments were adopted in 1989, and those amendments were approved by the Muskogee Area Director, BIA.

As amended in 1989, Article XIII provides:

> Section 1. This constitution may be amended by a majority vote of the qualified voters of the tribe who vote in a special election called for that purpose by the Chief of the Seminole Nation of Oklahoma pursuant to rules and regulations the General Council shall prescribe. It shall be the duty of the Chief to

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1/ The Nation is one of the Five Tribes of Oklahoma, the others being the Cherokee, Chickasaw, Choctaw, and Muscogee (Creek) Nations. These tribes have been the subject of a substantial amount of special legislation. Three statutes are of particular relevance to this appeal: The Curtis Act of June 28, 1898, 30 Stat. 495; the Five Tribes Act of Apr. 26, 1906, 34 Stat. 137; and the Act of Oct. 22, 1970, 84 Stat. 1091. These statutes and their implementation by the Department of the Interior were discussed in Harjo v. Kleppe , 420 F. Supp. 1110 (D.D.C. 1976), aff'd sub nom. Harjo v Andrus, 581 F.2d 949 (D.C. Cir. 1978), a case brought by members of the Muscogee (Creek) Nation.

2/ The constitution was not adopted pursuant to any Federal statutory authority. Like other Oklahoma tribes, the Nation was excluded from coverage of the Indian Reorganization Act (IRA), 25 U.S.C. § 476 (1988). See 25 U.S.C. § 473 (1988). Although eligible to organize under the Oklahoma Indian Welfare Act (OIWA), 25 U.S.C. § 503 (1988), the Nation chose not to do so.

All further references to the United States Code are to the 1988 edition.

call such an election upon the request of fifteen (15) members of the General Council. Amendments so ratified shall be submitted to the Commissioner of Indian Affairs and shall have full force and effect from the date of his approval.

Section 2. A notice in the form of a resolution duly adopted by the General Council as to the time and place of any election to adopt or reject any proposed amendment must be given not less than sixty (60) days before election day. Such notice must include the full text of any proposed amendment and must appear subsequently at fifteen (15) day intervals in at least two (2) prominent newspapers published within Seminole County.

On December 14, 1991, the Nation held an election for the purpose of considering five proposed constitutional amendments. One of the proposed amendments concerned Article XIII. The ballot for this amendment read:

PROPOSED AMENDMENT #5: ELIMINATION OF FEDERAL APPROVAL OF AMENDMENTS OF CONSTITUTION

SHALL ARTICLE XIII OF THE CONSTITUTION BE AMENDED, SAID AMENDMENT TO BE EFFECTIVE AS TO ALL CONSTITUTIONAL AMENDMENTS MADE ON OR AFTER DECEMBER 14, 1991, TO TAKE OUT THE FOLLOWING SENTENCE FROM THE END OF SECTION 1:

Amendments shall be submitted to the Commissioner of Indian Affairs and shall have full force and effect from the date of his approval.

Three of the five proposed amendments, including Proposed Amendment No. 5, were adopted at the December 14, 1991, election. The Nation's Principal Chief sent a certification of election results to the Superintendent, Wewoka Agency, BIA, on December 23, 1991, but did not request approval of the three adopted amendments. The certification was transmitted to the Muskogee Area Director, who concluded that approval of the amendments was required under Article XIII of the Nation's previously approved constitution. The Area Director further concluded that two of the three amendments were "major in nature" and therefore must be reviewed by BIA's Central Office. Accordingly, the Area Director transmitted the amendments and other relevant election documents to the Central Office.

On July 17, 1992, the Director issued the decision on appeal here. He approved two amendments but disapproved the amendment to Article XIII. He stated:

Proposed Amendment No. 5 would amend Article XII [sic] by eliminating the requirement that future amendments to the Constitution of the Seminole Nation be subject to the approval of the Secretary of the Interior (Commissioner of Indian Affairs). The proposed amendment was adopted by a vote of 112 for and 102 against.

The constitution of the Seminole Nation was adopted by the tribe in a form which required Bureau of Indian Affairs (BIA) review and approval of the initial document and which in its present form requires approval of any amendment to the Constitution. The Commissioner of Indian Affairs approved the existing constitution on [April 15], 1969. Thus, the present constitution along with applicable treaty provisions and Federal statutes governing Indian affairs function as an expression of the government-to-government relationship between the United States and the Seminole Nation. Both parties have agreed to be bound by the terms of that relationship as set forth in the tribe's constitution. Approval of the tribal constitution is based upon a determination by the Secretary that inter alia it is a document which includes all articles and provisions necessary to support effective self-government, it is not in conflict with Federal law or policy, and it defines the government-to-government relationship with the United States. Future changes to an approved constitution which are not subject to approval can be problematical in that they may alter the fundamental nature of the defined relationship. Amendments which are inconsistent with Federal law or policy could result in withdrawal of Secretarial approval of the underlying document. See Potts v. Bruce, 533 F.2d 527 (10th Cir. 1976), cert. denied, 429 U.S. 1002. Tribal action which is consistent with the terms of an approved constitution bears a strong presumption of validity and authority. Tribal action taken pursuant to unapproved amendments to the governing document would have to be scrutinized by the Secretary whenever those actions affect BIA policies and programs. Further, officers or representatives of a tribe who have been elected and installed pursuant to a constitution approved by the Secretary can come and deal with the Department of the Interior on a government-to-government basis supported by a strong presumption of authority. Those without an approved constitution remain ever vulnerable to ad hoc challenges to their authority to represent their people.

In connection with the 1988 amendments to the Indian Reorganization Act (IRA) of June 18, 1934 (48 Stat. 984), the Secretary recommended that his involvement in the calling of elections and approval of constitutions and bylaws, and amendments to them, be eliminated. See S. Rep. No. 100-577, 100th Cong., 2d Sess. 34-35 (1988). However, Congress declined to do so thereby signifying that Congress wants the Secretary's continued involvement. Therefore, until such time as Congress makes it clear that the Secretary should not be exercising any authority and judgment in approving constitutions and amendments thereto and relieves the Secretary of his responsibility over Indian affairs, the Secretary cannot approve any amendments which would eliminate Secretarial approval. For consistency throughout Indian country and to avoid any possibility that there would be disparate treatment between tribes in the approval of constitutions and amendments,

> the Secretary's involvement is mandated with respect to both IRA and non-IRA constitutions. Proposed Amendment No. 5 is hereby disapproved.

(July 17, 1992, Decision at 2-3). In an accompanying certificate of disapproval, the Director stated that his disapproval was given "by virtue of the authority granted to the Secretary of the Interior and delegated to me by 230 D.M. 2.4, and by Article XII [sic] of the Constitution of the Seminole Nation of Oklahoma." 3/

The Nation's notice of appeal from this decision was received by the Board on August 28, 1992. 4/ Both the Nation and the Director filed briefs. In addition, the Cherokee Nation sought and was granted permission to file a brief as amicus curiae.

Request for Evidentiary Hearing

The Nation moves to supplement the record and requests an evidentiary hearing for the purpose of offering "evidence related to the history of the exercise of governmental powers by the [Nation] and the BIA's interference in the Nation's governmental process, including the development and amendment of its Constitution; * * * BIA's policies and practices regarding the tribal organization of other Indian tribes; * * * and other tribal organizational documents" (Nation's Motion to Supplement Record and for Evidentiary Hearing). 5/ The Nation further contends that "a review of the

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3/ 230 DM 2.4B (Nov. 4, 1988) authorizes the Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) (now the Director, Office of Tribal Services) to "[c]all or conduct elections or referendums for the initial adoption of constitutions or the complete revision of existing constitutions, and approve the results of such elections or referendums."

Article XII of the Seminole Constitution sets out the Nation's Bill of Rights.

4/ The Director did not inform the Nation of its right to appeal his decision to the Board. In fact, there appears to have been uncertainty as to whether the Director's decision was subject to an administrative appeal.

Under 25 CFR 2.3, the decisions of BIA officials are subject to the appeal regulations in 25 CFR Part 2, unless some "other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision." On occasion, a regulation provides that the decision of a BIA official is final for the Department. E.g., 25 CFR 88.1(c), concerning approval of tribal attorney contracts. See Welch v. Minneapolis Area Director, 17 IBIA 56 (1989). Absent a regulatory or statutory provision making a BIA decision final or subject to a different administrative appeal procedure, the decisions of BIA officials are appealable under 25 CFR Part 2.

5/ The Nation submits, inter alia, an affidavit from William C. Wantland, its Attorney General during 1969-1972 and 1975-1977. The affidavit states in part:

"14. During the drafting process the Constitution Committee strove to develop a Constitution affording as little federal involvement in tribal

history of federal administrative interference with the Seminole Nation is necessary in order to fully appreciate the Seminole Nation's desire and need to determine its form of government free from federal 'bureaucratic imperialism.'" (Nation's Reply Brief at 2).

The Board takes as a given that the Nation has a strong desire to determine its form of government free from federal interference. The Board assumes, for purposes of this decision, that BIA was heavily involved, even to the point of interference, in the Nation's constitutional development processes. It further assumes that the historical relationship between the Federal Government and the Nation is comparable to that between the Federal Government and the Muscogee (Creek) Nation, as described in Harjo v. Kleppe. Finally, the Board has the authority to, and does in this case, take judicial notice of information concerning the organizational status of other Indian tribes.

For these reasons, and in light of the analysis below, the Board finds that an evidentiary hearing is not necessary here. Accordingly, the Nation's motion is denied.

Discussion and Conclusions

The Nation contends that the Director's disapproval of its amendment is, inter alia, (1) another instance of a longstanding BIA practice of interference in the Nation's government; (2) arbitrary and capricious and an abuse of discretion; (3) not required by Federal statute; (4) in conflict with the Federal policy favoring tribal self-determination; and (5) inconsistent with BIA regulations, policies, and practice. Further, the Nation argues, the Director's reliance upon Article XII of its constitution as authority for the disapproval is an unauthorized interpretation of the Nation's constitution. 6/

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fn. 5 (continued)
affairs as possible but officials of the Bureau of Indian Affairs met regularly with the Committee, insisted that various provisions be included in the Constitution, and generally tried to control and interfere with the development of the Nation's Constitution.

"15. The 1969 Constitution as approved was in part the product of the position of the Bureau of Indian Affairs officials that certain provisions had to be added as a prerequisite to the calling of a Constitutional referendum."

6/ It appears that the Director" citation to Article XII in his certificate of disapproval was an inadvertent error. The same error appears in his decision letter, and it is clear from the context there that Article XIII was meant.

To the extent the Director intended to rely on Article XII, the Nation's Bill of Rights, as authority for disapproval of Amendment No. 5, the Board agrees with the Nation that such reliance was unwarranted. The Secretary's authority to approve or disapprove constitutional amendments derives from Article XIII, not Article XII.

The Director argues that he had authority to disapprove the amendment "both as a matter of law and a matter of policy in the exercise of his discretion" (Director's brief at 1). In his answer brief, he contends for the first time that there are two Federal statutory provisions which make the Nation's constitutional amendments subject to Secretarial approval, i.e., section 28 of the Five Tribes Act, 34 Stat. 137, 148, and the Act of October 22, 1970, 84 Stat. 1091. The Board addresses the Director's statutory argument first. Clearly, if approval of the Nation's constitutional amendments is required by statute, there is no need to address many of the other issues raised in this appeal.

As originally enacted, section 28 of the Five Tribes Act provided:

> That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States. Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States. [7/]

The Director contends:

> While this statute may seem antiquated, it remains the law until changed by Congress. See Harjo v. Kleppe, [supra, 420 F. Supp. at 1129]. Appellant cannot avoid the legal effect of this

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fn. 6 (continued)

The Nation appears to have abandoned its earlier view that Amendment No. 5 became effective immediately upon adoption by the tribal electorate. If the Nation had made such an argument here, the Board would have rejected it. It is clear from the language of Article XIII that any amendment adopted by the Nation, including an amendment to delete the approval requirement, would require approval in order to become effective.

7/ The second proviso was repealed by section 2 of the Act of July 3, 1952, 66 Stat. 323. Section 1 of the 1952 act, now codified at 25 U.S.C. § 82a, provides:

"Contracts involving the payment or expenditure of any money or affecting any property belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes of Indians, including contracts for professional legal services, may be made by said tribes, with the approval of the Secretary of the Interior, or his authorized representative, under such rules and regulations as the Secretary of the Interior may prescribe."

> statutory requirement by arguing that the action in question was the vote of the people on the amendment rather than the action of the tribal council in proposing the amendment. The statute requires approval, either express or implied, of council actions proposing the amendments either before the election or retroactively after the amendments are voted on. Without at least implied retroactive Secretarial approval of council action proposing the amendment, the proposal cannot be effective.

(Director's Brief at 2).

The Nation counters that BIA historically has not required the Nation to submit its laws for approval. It points out that its 1969 constitution does not contain such a requirement, yet was approved by BIA (Nation's Opening Brief at 41 n.15; Nation's Reply Brief at 3-4). 8/ In light of BIA's past practice in this regard, the Nation contends, it makes no sense for BIA now to take the position that it must approve General Council resolutions proposing constitutional amendments.

As the Nation argues, BIA approved the Nation's constitution even though it did not contain a requirement that enactments of the General Council be approved by BIA. However, that fact in itself does not show that BIA believed the General Council's enactments were not subject to approval. BIA may simply have thought the approval requirement need not appear in the constitution because it was a matter of Federal law. Or BIA may have believed that the matter was adequately addressed in the general statement in Article V that the exercise of General Council powers was "subject to any restrictions contained in the constitution[] or laws of the United States." 9/ The Board concludes that BIA's earlier position as to

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8/ The Nation contends that none of the BIA-approved constitutions of the Five Tribes contains a requirement for approval of tribal laws and that BIA has not required any of the tribes to submit their laws for approval. The Cherokee Nation does not address this point in its amicus brief.

9/ BIA's present policy is to encourage the inclusion of specific approval requirements in tribal constitutions to cover tribal actions which are subject to approval as a matter of Federal law. The policy is explained at page 5 of a January 1981 BIA document entitled "Drafting and Reviewing Proposed Tribal Constitutions and Amendments," which is included in the record for this appeal:

"In only a few cases does a Federal Statute require that tribal enactments be subject to approval by the Secretary of the Interior. The approval of attorney contracts is an example. In those instances, Bureau policy is to include mention of that requirement in the powers article as long as this is required by Federal Law. Because of the turnover of persons both in the Bureau and the tribe, it is useful to have such language to avoid failure to comply with the law."

As discussed, there is no explicit approval requirement in the Nation's constitution. This is true even with respect to the General Council's power to employ legal counsel, Article V(g), despite the fact that the Nation's attorney contracts are unquestionably subject to approval under 25 U.S.C.

the necessity for approval of General Council enactments cannot be deduced with any certainty from the fact that BIA did not require the Nation to include an approval requirement in its constitution.

Whether, or to what extent, BIA has in the past required the Nation to submit its laws for approval is a question of fact which cannot be resolved on the present record. 10/ In light of the conclusions discussed below, the Board does not believe it is necessary to scrutinize BIA's past practice in this regard. The Board notes in passing, however, that Harjo suggests the practice has varied from time to time. 11/ E.g., 410 F. Supp. at 1132, 1135, 1136. There is also an indication in Harjo that BIA has not deemed all resolutions of the Five Tribes subject to the approval requirement, despite the apparently all-encompassing language of the statutory provision. See 420 F. Supp. at 1131:

> In August 1907 the Creek National Council met for its usual session and passed a resolution calling the regular quadrennial election for Principal Chief and Second Chief. * * * Although the Commissioner [of Indian Affairs] apparently realized that the Creek National Council's resolution calling on the Principal Chief to call the election did not require approval of the Department ('the resolution does not appear to require executive action'), he nevertheless * * *.

It is not clear from this brief reference why the resolution alluded to was thought not to require approval. The statement is, however, evidence of a BIA interpretation of section 28, contemporaneous with enactment of the Five Tribes Act, that not all tribal resolutions required approval under that section. See Udall v. Tallman, 380 U.S. 1, 16 (1965) (contemporaneous construction of statute by agency charged with its enforcement entitled to deference).

[1] The Nation makes a second argument concerning the approval requirement in section 28. It contends that the requirement has been repealed by the OIWA. Here, the Nation relies on Muskogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). In that case, it was held that the Curtis Act, which

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fn. 9 (continued)
§ 82a. See note 7. It appears, therefore, that the policy described above was either not in effect at the time the Nation's 1969 constitution was approved or was not observed strictly in this instance.

10/ The Nation states that, in April 1991, it repealed a tribal law requiring BIA approval of its laws and that, since then, it has submitted for BIA approval only those laws which are required to be approved under 25 CFR 11.1(e) (Nation's Opening Brief at 41 n.15). The Nation does not contend that BIA has condoned the Nation's practice.

11/ As noted above, Harjo involved the Muscogee (Creek) Nation. Although the court's specific references are to events concerning that tribe, it is fair to assume, as the Board has done, that BIA policy in this regard was relatively consistent with respect to all of the Five Tribes.

abolished the tribal courts of some of the Five Tribes, 12/ "was repealed by the OIWA and that therefore the Muscogee (Creek) Nation has the power to establish Tribal courts * * * subject, of course, to the limitations imposed by statutes generally applicable to all tribes." 851 F.2d at 1446-47 (Emphasis in original). The Nation relies in particular upon the court's analysis of a statement made by Senator Elmer Thomas in hearings on the OIWA:

> That statement [by Senator Thomas] certainly indicates an intent that the piecemeal legislation, i.e., those statutes applicable to only one or a few tribes, be done away with and a uniform law passed. Reading the OIWA as Interior would have it read would result in a perpetuation of the piecemeal legislation rather than its elimination. The very existence of the Curtis Act conflicts with the purpose of eliminating piecemeal legislation.

851 F.2d at 1446. The Nation contends: "The application of this reasoning results in the conclusion that the OIWA also repealed the Five Tribes Act's requirement of Presidential approval of Five Tribes legislation, since application of that requirement would be inconsistent with the intent of Congress to eliminate piecemeal legislation" (Nation's Reply Brief at 4).

The Nation takes a very broad view of the court's reasoning. It is apparent from a reading of Muscogee (Creek) Nation that a perceived Congressional intent to do away with piecemeal legislation was only one of several factors considered by the court before it concluded that the Curtis Act had been repealed by the OIWA. The court did not hold that any part of the Five Tribes Act had been repealed, and the Nation puts forth only a very general analogy in support of its repeal theory. Even taking into account the special rules of statutory construction which come into play where Indians are concerned, see infra, more than this vague analogy is required to support a finding of repeal in a case where, as here, any repeal would be by implication.

There are clear differences between the matter at issue here and the one at issue in Muscogee (Creek) Nation. For one thing, the "piecemeal"

12/ This provision did not affect the Nation's courts, because of an agreement entered into on Dec. 16, 1897. See Act of July 1, 1898, 30 Stat. 567, ratifying the Dec. 1897 agreement.

The same agreement exempted the Nation from a provision in the Act of June 7, 1897, 30 Stat. 62, 84, which called for approval of tribal enactments. See Seminole Nation v. United States, 316 U.S. 286, 302 (1942): "[T]he Seminole tribal government was not only to continue after the Curtis Act but was in fact relieved of the necessity of securing Presidential approval of its legislation by an agreement ratified three days after the passage of that statute."

The Nation quotes the Supreme Court's statement in Seminole Nation and suggests, although it does not specifically contend, that the agreement also exempted the Nation from the approval requirement in the later Five Tribes Act. (Nation's Reply Brief at 4 n.1).

effect of the statutory provision at issue here is far less drastic. As it has been put by one respected authority:

> Many of the limitations that Congress has placed on basic governmental operations of the Five Tribes, such as the requirement of presidential approval of tribal laws and authorization by the Secretary of the Interior to approve contracts involving expenditures of tribal funds, are similar to administrative treatment of other tribes by the federal government. 129/
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> _____
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> 129/ For example, many tribal constitutions under the Indian Reorganization Act require secretarial approval of some or all tribal legislation.

F. Cohen, Handbook of Federal Indian Law 784 (1982 ed.). At least as this authority sees it, therefore, the approval requirement in the Five Tribes Act does not place the Five Tribes in a markedly different position than that occupied by other tribes. 13/ By contrast, the Curtis Act's abolition of tribal courts was a radical departure from the norm. No other tribes of which the Board is aware have been explicitly deprived of their courts by Federal statute.

It is also significant that, subsequent to enactment of the OIWA in 1936, Congress continued to legislate specially for the Five Tribes as if the Five Tribes Act were still in effect. Of particular relevance here, since they concern governmental functions of the tribes, 14/ are the 1970 statute cited by the Director, and discussed further below, and the 1952 statute cited in footnote 7. The 1970 statute provides:

> [N]otwithstanding any other provisions of law, the principal chiefs of the Cherokee, Choctaw, Creek, and Seminole Tribes of Oklahoma and the governor of the Chickasaw Tribe of Oklahoma shall be popularly selected by the respective tribes in accordance with procedures established by the officially recognized tribal spokesman and or governing entity. Such established procedures shall be subject to approval by the Secretary of the Interior.

As explained in the House report, this statute was intended to overcome the effect of section 6 of the Five Tribes Act:

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13/ There are differences, of course. For instance, where the requirement for Secretarial approval of a tribe's laws appears only in the tribal constitution, the tribe may amend its constitution to remove the approval requirement. See Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 199 (1985).

14/ The Nation does not describe the scope of the repeal it advocates. However, since it believes the legislation approval requirement was repealed by the OIWA, it presumably also believes that other provisions of the Five Tribes Act affecting tribal government were repealed at the same time. Indeed, some of the other provisions appear to be considerably more intrusive than the approval requirement.

> Section 6 of the [Five Tribes Act] authorizes the President of the United States to remove [the principal officers of the Five Tribes] should they refuse to perform their duties under the act. The President is also authorized to fill any vacancy arising from removal, disability, or death by the appointment of a citizen by blood of the tribe. The President delegated his authority to the Secretary of the Interior in Executive Order No. 10250, dated June 5, 1951.
>
> Changes in the circumstances surrounding the Five Civilized Tribes are not consistent with the continuation of the appointive process.

H.R. Rep. No. 1499, 91st Cong., 2d Sess. 1, reprinted in 1970 U.S. Code Cong. & Admin. News 4332. Clearly, Congress did not believe in 1970 that it had repealed section 6 of the Five Tribes Act when it enacted the OIWA. 15/

The Act of July 3, 1952, 66 Stat. 323, repealed the final proviso of section 28 of the Five Tribes Act and replaced it with the present 25 U.S.C. § 82a. The fact that Congress found it necessary to repeal the proviso indicates that it did not believe the proviso had been repealed by the OIWA.

The Board finds that, without a more persuasive argument than that put forth by the Nation, it cannot conclude that the approval requirement in the Five Tribes Act was repealed by the OIWA.

[2] This does not end the inquiry as to section 28, however. As the Director recognizes, the approval requirement in section 28 does not, by its terms, apply to constitutional amendments. The Director contends only that it applies to "the action of the tribal council in proposing the amendment."

"Resolutions" are among the enactments subject to approval under section 28. Article XIII, section 2, of the Nation's constitution provides that notice of an election on a proposed constitutional amendment must be given by resolution of the General Council. Article XIII, section 1, however, which directs the Chief to call an election "at the request of fifteen (15) members of the General Council," does not specify the form the request must take. Resolution 91-19, included in the record for this appeal, appears to consolidate the "request" required by section 1 and the "notice" required by section 2 into a single document. 16/ Based upon this

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15/ The district court in Harjo concluded that the Department of the Interior had assumed more authority over appointment of the tribal officers than was warranted by section 6 of the Five Tribes Act. E.g., 420 F. Supp. at 1131-32, 1139. Regardless of whether Congress in 1970 was seeking to overcome the statute itself or the Department's interpretation of the statute, it is apparent that Congress believed that section 6 of the Five Tribes Act was still in effect.

16/ The resolution, dated July 27, 1991, is titled "A RESOLUTION REQUESTING THE PRINCIPAL CHIEF OF THE SEMINOLE NATION OF OKLAHOMA TO CALL A SPECIAL ELECTION TO AMEND THE CONSTITUTION OF THE SEMINOLE NATION OF OKLAHOMA, AND

resolution, the Board concludes that, under tribal law, "requests" under section 1, as well as "notices" under section 2, are properly effected by resolution. Even so, it does not necessarily follow that a resolution proposing a constitutional amendment is a legislative act subject to approval under section 28. 17/

As a matter of constitutional law, it is generally recognized that a legislature, in proposing a constitutional amendment, does not act in its normal legislative, or law-enacting, capacity. See, e.g., 16 C.J.S. Constitutional Law § 10 (1984):

> Generally, under the constitutions of various states, constitutional amendments may be initiated by the legislature. In so doing, the legislature is not exercising its ordinary legislative power, but is acting as a special organ of government for the purpose of constitutional amendment, and the proposal of amendments to the constitution is not the exercise of an ordinary legislative function. (Footnotes omitted).

and 16 Am. Jur. Constitutional Law § 38 (1979):

> The cases are not in entire harmony on the question of the nature of the function performed by the legislature in proposing constitutional amendments. On the one hand, it has been said that the proposal of amendments is not legislative in the sense of passing laws, but it is nevertheless a legislative function. On the other hand, it has been declared that, in submitting propositions for the amendment of the constitution, the legislature is not exercising its legislative power or any sovereignty of the people which has been entrusted to it, but is merely acting under a limited power which is conferred upon it by the people and which might with equal propriety have been conferred on * * * any other body or tribunal. (Footnotes omitted.)

Not only are proposals for constitutional amendments different from ordinary legislative acts, they also have clear implications for the continued existence of the government to which they pertain. Thus it is appropriate to consider, on both these grounds, whether Congress had such proposals in mind when it enacted section 28. Despite the fact that section 28 continued the existence of the tribes and their governments, the

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fn. 16 (continued)
GIVING NOTICE AS TO THE TIME AND PLACE OF SAID ELECTION." It was amended by Resolution 91-19-A, dated Aug. 29, 1991, and Resolution 91-19B, dated Oct. 5, 1991.

17/ As noted above, in at least one instance, BIA stated that a resolution calling for an election for Principal Chief was not subject to approval. This statement recognizes, at the least, that the fact that an enactment is titled a "resolution" does not automatically bring it within the ambit of section 28.

Five Tribes Act as a whole contemplated the dissolution of the tribes. See Harjo, 420 F. Supp. at 1126-29. It seems unlikely, therefore, that Congress either expected or intended that the Five Tribes would adopt constitutions or constitutional amendments in the future. It seems more likely that Congress envisioned the tribal councils as enacting only ordinary legislation, and particularly legislation related to the ultimate aim of the statute.

At best, the phrase "act, ordinance, or resolution" in section 28 is ambiguous as to whether or not it includes proposals for constitutional amendments. Under well-established rules of statutory construction, ambiguities in statutes must be construed liberally in favor of the Indians. E.g., County of Yakima v. Confederated Bands and Tribes of the Yakima Indian Nation, 112 S.Ct. 683, 693-94 (1992); Muskogee (Creek) Nation, 851 F.2d at 1444, 1446. The Board concludes that the phrase should not be construed to include tribal council proposals for constitutional amendments.

The Board therefore holds that proposals for constitutional amendments made by the Nation's General Council are not subject to approval under section 28 of the Five Tribes Act.

[3] The second statute relied upon by the Director is the 1970 statute quoted above, which authorizes the Nation to select its Principal Chief, under procedures which are subject to approval by the Secretary. The Director contends: "The Seminole Constitution provides the essential procedures under which the Principal Chief is selected. Thus, amendments to it must be approved under this more modern statute" (Director's Brief at 3).

The Nation argues that, since the election article of its constitution was not amended at the 1991 election, the 1970 Act has no relevance to this appeal. It also contends that "the 1970 Act does not expressly make the validity of tribal election laws contingent upon Secretarial approval. Unlike the express requirement of the IRA [, 25 U.S.C. § 476(a),] that amendments 'shall become effective when ... approved by the Secretary...', the 1970 Act simply makes the 'established procedures' 'subject' to Secretarial approval" (Nation's Reply Brief at 5).

To the extent the Nation may be contending that the 1970 Act does not require Secretarial approval of constitutional amendments concerning procedures for selection of the Principal Chief, the Board disagrees. The statute is clear in subjecting such amendments to Secretarial approval, despite the differences in language between this provision and 25 U.S.C. § 476(a). However, the 1970 Act does not apply to constitutional amendments other than those dealing with selection of the Principal Chief. It is therefore not authority for the proposition that all of the Nation's constitutional amendments are subject to Secretarial approval as a matter of Federal law.

In accordance with the foregoing discussion, the Board holds that only the Nation's constitutional amendments concerning selection of the Principal Chief are subject to approval by Federal statute.

The Director also contends, however, that the Secretary has the authority to disapprove the Nation's Amendment No. 5 as "a matter of policy in the exercise of discretion." Citing, inter alia, Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967), he argues that the Secretary's exercise of the approval authority given to him by the Nation's present constitution is "totally within his discretion" (Director's Brief at 3).

As he did in his July 17, 1992, decision, the Director notes that Congress in 1988, although invited by the Department to repeal the Secretarial approval requirement for IRA constitutions and amendments, declined to do so. 18/ He contends:

> It can hardly be viewed as arbitrary then for the Secretary to insist that the requirement for his approval remain in the [Nation's] constitution. Maintaining the requirement for Secretarial approval of constitutional amendments is consistent with Congress' rejection of the Department's substitute legislation and ensures that the Seminole Constitution is consistent with Indian constitutions across the nation.

(Director's Brief at 4).

Concerning the 1988 IRA amendments, the Nation contends that requirements in the IRA cannot be applied to non-IRA tribes. It cites Muscogee (Creek) Nation in support of its contention, noting that the court refused in that case to read certain provisions of the IRA into the OIWA. See 851 F.2d at 1443-44. The Nation continues: "If Congress had intended the 1988 IRA amendments to apply to all tribes uniformly, it would have expressly stated that intent" (Nation's Reply Brief at 7).

In fact, it appears that the Department suggested to Congress that it make the 1988 amendments applicable to all tribes. The Assistant Secretary's letter concerning those amendments, quoted in part in footnote 18, continued:

18/ The Assistant Secretary - Indian Affairs stated in a Sept. 7, 1988, letter, which is included in the Senate report on the bill:

"Our * * * substitute bill would remove the Secretary from involvement in the calling of elections and approval of constitution[s] and bylaws, and amendments thereto. * * * Secretarial involvement in the calling of elections and approval of constitutions and bylaws, and amendments to them, is not consistent with the policy and goal of tribal self-determination. In addition, this option would remove any possibility that there would be disparate treatment between tribes in the approval of elections. Any challenges to tribal elections of tribal governing documents should be resolved through a tribal process in tribal forums."

S. Rep. No. 577, 100th Cong., 2d Sess. 34-35, reprinted in 1988 U.S. Code Cong. & Admin. News 3908, 3924-25.

> If the Committee chooses not to accept our substitute, we would not object to enactment of H. R. 2677 if it is amended as we suggest.
>
> First, H.R. 2677 would amend only the [IRA] and therefore the legislation would not apply to all tribes. Approximately 300 tribes have constitutions adopted under the [OIWA], have constitutions approved under the Secretary's general authority, or have no governing documents. In these cases H.R. 2677 would not apply. As we stated above, we would object to such disparate treatment of tribes.

(S. Rep. No. 577 at 35, 1988 U.S. Code Cong. & Admin. News at 3925). Despite the Department's views, Congress enacted a bill covering only IRA tribes.

The fact that the 1988 amendments apply only to IRA tribes, however, cuts both ways. The amendments contain an approval requirement which, as the Nation contends, is applicable only to IRA tribes. At the same time, the 1988 amendments limit, or arguably remove altogether, the Secretary's discretion concerning the disapproval of constitutions or amendments. 19/ This statutory limitation upon the Secretary's disapproval authority is available only to IRA tribes.

The Nation contends that BIA's position concerning the Nation's constitutional amendment is inconsistent with BIA's policy toward tribes which lack Federally approved constitutions. BIA carries on government-to-government relationships with those tribes, the Nation argues, and is therefore acting in an arbitrary and capricious manner toward the Nation in refusing to allow it to remove the amendment approval requirement from its constitution.

It is true that BIA recognizes many Indian tribes which lack Federally approved constitutions. In a 1984 list of Federally recognized Indian entities, BIA included 95 tribes outside of Alaska (and 126 in Alaska) under the category "Traditional Organizations (Recognition without Formal Approval of Organizational Structure)." 20/

19/ E.g., 25 U.S.C. § 476(d)(1): "If an election * * * results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws."

See Cheyenne River Sioux Tribe v. Aberdeen Area Director, 24 IBIA 55 (1993).

20/ "Organizational Status of Federally Recognized Indian Entities," Memorandum of Tribal Relations Specialist, Dec. 13, 1983, updated Dec. 4, 1984.

See also, e.g., Naranjo v. Albuquerque Area Director, 23 IBIA 291, recon. denied, 24 IBIA 32 (1993), which concerned the unapproved governing document of the Pueblo of San Ildefonso.

However, the Nation is clearly not in the same position as those tribes. Unlike them, it has an approved constitution. It neither seeks to persuade BIA to withdraw approval of its present constitution, cf. Potts v. Bruce, supra, nor proposes to revoke that constitution and replace it with an unapproved constitution without any internal requirement for Departmental approval. Rather, it apparently envisions a constitution in which various future unapproved amendments would be interpolated into the approved document.

BIA and other Departmental officials, including this Board, are bound by tribal constitutions which have been approved by the Secretary. Kialegee Tribal Town v. Muskogee Area Director, 19 IBIA 296, 302 (1991); Estate of Peter Alvin Ward, 19 IBIA 196, 205-07, 98 I.D. 14, 19-20 (1991); Edwards, McCoy & Kennedy v. Acting Phoenix Area Director, 18 IBIA 454 (1990), aff'd sub nom. Western Shoshone Business Council v. Babbitt, No. 92-4062 (10th Cir. July 27, 1993). The same is true of a constitution approved by the Commissioner of Indian Affairs under authority delegated by the Secretary. Unapproved tribal governing documents, while clearly entitled to respect, see, e.g., Naranjo, supra, are not binding on Departmental officials in the same sense and would not necessarily preclude BIA from looking behind the documents if necessary to carry out the government-to-government relationship--in a case, for instance, where BIA determined that a constitutional provision was in violation of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302. Cf., e.g., United Keetoowah Band of Cherokee Indians v. Area Director, 22 IBIA 75 (1992) (BIA has the authority and the responsibility to decline to recognize the results of a tribal election when it finds that a violation of the ICRA has tainted the election results). BIA has a tenable interest in maintaining a clear distinction between those constitutional provisions which it has approved and those which it has not. Such distinctions would become more and more difficult over the years if a tribe were to enact a number of unapproved amendments, especially if those amendments were interspersed throughout the document, as might well be the case. 21/

[4] Neither the Nation's constitution nor any Federal statute explicitly limits the Secretary's authority to disapprove the Nation's constitutional amendments. Thus, BIA clearly has some discretion in this regard, even if that discretion may not be as broad as the Director contends. Cf., e.g., Cheyenne River Sioux Tribe, supra; Ute Indian Tribe, supra (Even

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21/ As discussed above, those portions of the Fives Tribes' constitutions governing selection of a principal chief are required by statute to be approved. It is conceivable that one of the Five Tribes, if it wished to operate under an unapproved constitution, could separate the portion of the constitution governing selection of the principal chief from the remainder in such a way as to avoid the problems discussed. Cf. Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director, 21 IBIA 24, 32 (1991). ("When confronted with [a tribal] ordinance that contains sections that are subject to review [under a tribal constitution] and sections that are not, BIA must limit its review and approval or disapproval to those sections that are subject to Secretarial review.")

where required by statute or a tribal constitution, BIA review of tribal enactments is an intrusion into tribal self-government and should be undertaken in such a way as to avoid unnecessary interference with the tribe's right to self-government).

The Board's review authority over discretionary decisions of BIA officials is limited. 43 CFR 4.330(b)(2). In particular, the Board may not substitute its judgment for that of BIA, even though it might have reached a different conclusion. See, e.g., GMG Oil and Gas Corp. v. Muskogee Area Director, 18 IBIA 187, 190 (1990). In this case, given BIA' s tenable interest in maintaining distinctions between approved and unapproved constitutional provisions, the Board concludes that the decision to disapprove Amendment No. 5 was made within the scope of BIA's discretion under Article XIII of the Nation's constitution.

Where an appellant challenges a decision made by BIA in the exercise of its discretionary authority, the burden is on the appellant to show that BIA did not properly exercise its discretion. E.g., Ross v. Acting Muskogee Area Director, 21 IBIA 251 (1992). The Board finds that the Nation has failed to make such a showing in this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Director's July 17, 1992, decision is affirmed. 22/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

22/ This disposition does not mean that the Board agrees with all the statements made by the Director in his decision or all his arguments before the Board. The Board is not persuaded, for instance, that there is a "mandate" for Secretarial involvement in both IRA and non-IRA constitutions. As discussed in this decision, Congress has not enacted any general requirement for Secretarial approval of tribal constitutions. Further, as also discussed, BIA does not require tribes to have approved constitutions in order to be recognized as eligible for BIA programs.